Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of American Electric Power Service Corporation, *et al.* For Declaratory Ruling that the Telecommunications Rate Applies to Cable System Pole Attachments Used to Provide Interconnected Voice over Internet Protocol Service	)	**WC Docket No. 09-154**

To: The Commission

COMMENTS OF THE COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
Kansas City Power and Light
National Grid
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PPL

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SUMMARY

Electric utility ratepayers currently subsidize the cable industry with artificially low cable-only pole attachment rates to the astounding tune of approximately $10 million per year for every 500,000 attachments that cable companies affix to electric utility poles. CLECs also receive an unjustified subsidy at the expense of electric utility ratepayers, but their subsidy is not nearly as dramatic.

There is no legitimate public policy reason for this anti-competitive disparity in pole attachment subsidies to continue. Cable company VoIP voice service is functionally and otherwise equivalent to CLEC circuit-switched voice service. At a minimum, attachment rates for these two services should be the same.

One glaring problem with the cable industry's current pole attachment subsidy is that cable operators undoubtedly will not take the tens of millions that they save on pole attachments in urban and suburban systems, where systems are fully deployed and customers and revenues are abundant, and invest that windfall in rural and other unserved areas where customers and potential revenues are scarce. Why? Because capital costs in deploying rural systems – not "high" pole attachment fees – prevent an acceptable return on investment.

That, of course, is the real reason why these areas have no VoIP or wireline broadband service. The cable industry itself admits that it does not deploy VoIP or high speed broadband service in rural areas today because of the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.

The National Cable and Telecommunications Association ("NCTA") and Senator Hutchinson are absolutely correct that the best way to spur the deployment of VoIP and broadband in rural areas is to provide targeted subsidies to offset rural system capital costs.

Continuing colossal pole attachment subsidies to gigantic cable television companies in the urban and suburban areas that they already serve makes no sense at all. Not only does VoIP and broadband already exist in these areas, it is also unlikely to increase VoIP and broadband investment in unserved rural areas.

While the electric utility ratepayers should subsidize neither industry, subsidizing one (cable) more than the other (CLECs) distorts the market for existing and future telephone and broadband services and reduces the competition that NCTA itself notes is necessary to spur the development of broadband services.

Congress established the artificially low cable-only pole attachment rate subsidy in 1978 in order "to spur the growth of the cable industry, which in 1978 was in its infancy."[1] Comcast Corporation, which has become the nation's third largest voice provider with revenues of $34.3 *billion* last year and profits of $2.5 *billion* for each of the past three years, does not need or deserve continued subsidies, particularly one that is outdated, inefficient, unproductive and anticompetitive. The continued cable subsidy makes even less sense because it is provided by the electric utility industry, which is reducing its workforce and trimming other expenses because of tremendous public utility commission pressure to reduce rates. In this economic environment, there is absolutely no public policy justification for a continued subsidization of the cable industry by electric utility ratepayers, some of whom do not subscribe to cable services.

[1] H.R. Rep. No. 104-204, at 91 (1995).

Even if extending the Cable-only pole attachment rate subsidy to CLECs made any sense from a policy perspective, the Commission lacks the authority necessary to lower the statutory Telecom attachment rate paid by CLECs. As confirmed by the Supreme Court and the Commission's own rulings, the Pole Attachment Act prohibits any uniform cable/CLEC attachment rate that is lower than the existing Telecom rate.

To promote telephone and broadband development, the Commission should eliminate the preferential treatment of cable attachments and establish a uniform broadband attachment rate at a level at least equal to the existing Telecom rate.

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COMMENTS

Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, NSTAR and PPL (collectively, the "*Coalition of Concerned Utilities*" or "*Coalition*"), by their counsel and pursuant to the Public Notice released August 25, 2009 by the Federal Communications Commission ("FCC" or "Commission"),[2] hereby submit these Comments supporting the above-referenced Petition of American Electric Power Service Corporation, *et al.* ("Petition").

I. INTRODUCTION

Cable operators for years have received an unwarranted, colossal subsidy for pole attachments used to provide Voice over Internet Protocol ("VoIP") telephone service, all at the expense of competitive local exchange carriers ("CLECs") and, of course, electric utility ratepayers who provide the subsidy. The attachment rate subsidy applicable to "CATV"

[2] Public Notice, "Pleading Cycle Established for Comments on Petition for Declaratory Ruling of American Electric Power Service Corporation, *et al.* Regarding the Rate for Cable System Pole Attachments Used to Provide Voice over Internet Protocol Service," WC Docket No. 09-154, DA 09-1879 (Aug. 25, 2009).

operators is outdated, unfair, undeserved and inefficient, and is having the effect of stifling telephone and broadband competition nationwide.

VoIP is the functional equivalent of circuit-switched telephone service and in certain respects (given its functional capabilities) is a superior service. As explained below, there is no policy reason to continue subsidizing cable company voice services at the expense of competitors.

The *Coalition* agrees with Petitioners that the nondiscrimination requirement in the Pole Attachment Act requires that the rate charged CLECs for circuit-switched telephone attachments be the same as the rate charged cable companies for their VoIP telephone attachments.[3] The statute requires that the nondiscriminatory uniform rate for both cable and CLEC telephone attachments be set at least as high as the Telecommunications rate. Should communications attachers provide broadband services in addition to telephone service, the Commission has authority to establish a higher, more reasonable, rate such as the City of Seattle rate proposed by the *Coalition* in the ongoing Pole Attachment Proceeding.[4]

II. ELIMINATING THE CABLE INDUSTRY'S POLE ATTACHMENT SUBSIDY IN ACCORDANCE WITH STATUTORY REQUIREMENTS WILL PROMOTE COMPETITION BY LEVELING THE PLAYING FIELD FOR ALL TELEPHONE SERVICE PROVIDERS

Cable operators in the Pole Attachment Proceeding and in the Broadband Notice of Inquiry Proceeding[5] recognize that the rate they pay for attaching to the distribution poles owned by electric utilities and incumbent local exchange carriers ("ILECs") is far lower than the

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[3] Petition at 16, citing 47 U.S.C. § 224(e).

[4] Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, (WC Docket No. 07-245) (Feb. 6, 2008) (hereinafter, "Pole Attachment Proceeding").

[5] A National Broadband Plan for Our Future, Notice of Inquiry (GN Docket No. 09-51) (Apr. 8, 2009) (hereinafter, "Broadband NOI Proceeding").

attachment rate paid by CLECs.[6] This unfair favoritism has been in effect since enactment of the Telecommunications Act of 1996.[7]

The cable industry's solution to this disparity is to support (reluctantly, it seems) a uniform rate for pole attachments used by cable companies and CLECs alike to provide broadband service, at the very low Cable-only attachment rate currently applicable only to cable television systems.[8] They claim that this very low Cable-only rate will promote broadband development by reducing costs.[9]

As explained below, however, providing the artificially low, subsidized Cable-only rate to broadband providers would do precious little to promote broadband or VoIP development, is poor public policy for a number of other reasons, and is impossible to do in any event because the Pole Attachment Act prohibits any uniform cable/CLEC broadband rate that is lower than the existing Telecom rate. In the same way, the Act prohibits any uniform attachment rate for VoIP and circuit-switched voice services that is lower than the existing telecom rate.

A far better solution for promoting broadband development and the spread of VoIP and circuit-switched telephone services, which the cable industry itself seems to recognize,[10] is to eliminate government-sponsored subsidies (like the one-sided and outdated cable-only pole attachment subsidy) in the 92% of the country where broadband currently exists, to level the playing field among service providers to promote the offering of competitive broadband and

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[6] *See, e.g.*, Comments of the National Cable Telecommunications Association in the Broadband NOI Proceeding ("NCTA Broadband NOI Comments") at 35 (June 8, 2009).

[7] *See*, Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996). *See also*, 47 U.S.C. §§ 224(d), (e).

[8] NCTA Broadband NOI Comments at 35.

[9] *Id.*

[10] *See* NCTA Broadband NOI Comments at 26, and discussion of those Comments below.

telephone services, and to provide direct subsidies to those willing to provide broadband and competitive telephone service to unserved areas.

A. NCTA Itself Supports Eliminating Subsidies So That Competition Alone Can Spur Broadband Deployment

The Broadband NOI Comments filed by the National Cable Telecommunications Association ("NCTA") explain that providing subsidies to areas where competition already exists is counterproductive. NCTA recommends eliminating subsidies in these areas because competition alone will spur deployment and better service:

> Moreover, unlike the case in many other nations that have relied heavily on government subsidies, most areas of the United States already are served by at least two vigorously competitive providers. This means not simply that it is less urgent to subsidize deployment in those areas but that it would be counterproductive to do so. As noted above – and as the rapid ongoing deployment and upgrading of broadband facilities by cable operators and telephone companies confirms – competition among facilities-based providers itself spurs further deployment and upgrades.[11]

B. The Existing Cable-Only Attachment Rate Is A Colossal Subsidy That Is Paid To The Cable Industry By Electric Utility Ratepayers And Unfairly Favors The Cable Industry At The Expense Of CLECs

In its Comments in the Broadband NOI Proceeding, the *Coalition* explained that electric utility ratepayers currently subsidize the cable industry with artificially low Cable-only pole attachment rates to the astounding tune of approximately $10 million per year for every 500,000 attachments that cable companies affix to electric utility poles.[12] CLECs also receive a subsidy by electric ratepayers, but not nearly as much.

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[11] NCTA Broadband NOI Comments at 26.

[12] Comments of the Coalition of Concerned Utilities in the Broadband NOI Proceeding ("Coalition Broadband NOI Comments") at 3 (June 8, 2009).

There is no reason for this disparity in pole attachment subsidies to continue. Cable companies and CLECs now provide (or endeavor to provide) the same video, voice and Internet services. The cable industry's VoIP service is at least the functional equivalent of circuit-switched telephone service. To the extent that any entity is providing circuit-switched or VoIP telephone services, that entity should pay the same pole attachment rate as other entities that want to compete to provide telephone services.

The *Coalition* supports NCTA's arguments that eliminating subsidies where broadband service currently is offered and leveling the playing field among broadband service providers is the best way to promote broadband competition. By extension, the cable industry's VoIP attachment subsidy should be eliminated for the same reason.

To that end, the cable industry's colossal pole attachment subsidy should be terminated immediately and the gross disparity in pole attachment rates between cable operators and CLECs should be eliminated.

C. The Cable Industry Does Not Need Any Subsidies

The artificially low Cable-only attachment rate served its purpose long ago and now is just an antiquated, unproductive and unfair mechanism whereby the electric utility industry, which is reducing its workforce and trimming other expenses because of tremendous public utility commission pressure to reduce rates, can subsidize highly profitable, multi-billion dollar cable company giants whose businesses are expanding rapidly.

This was not the intent of Congress when the cable-only pole attachment subsidy was created. Instead, Congress explained that cable companies were furnished with a low pole attachment rate in 1978 in order "to spur the growth of the cable industry, which in 1978 was in its infancy."[13]

Cable is no longer in its infancy. "CATV" companies have transformed themselves into communications giants, offering not only cable television service, but also video on demand, broadband Internet access and telephone services. They have now even entered the wireless broadband market.[14] At this late date, it is inappropriate to allow the cable and telephone industries to "piggy back" on electric utility poles without paying a full attachment rate that fairly reflects the benefits they receive (and the costs they save) when they deploy their attachments on someone else's distribution poles.

Comcast, the largest cable company in the country, boasts a market capitalization of some \$27.3 billion.[15] It has 24.1 million cable customers, 15.3 million Internet access customers and 6.8 million voice customers.[16] Comcast has attracted enough voice customers that it recently supplanted Qwest as the third-largest residential phone provider in the nation.[17] The company reported revenue of \$34.3 billion in 2008 and income of \$2.54 billion.[18] In the first quarter of

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[13] H.R. Rep. No. 104-204, at 91 (1995).

[14] See, Mike Regoway, *Comcast Sets Portland WiMAX Plans*, The Oregonian, June 29, 2009, available at http://www.oregonlive.com/business/index.ssf/2009/06/comcast_sets_portland_wimax_pl.html (last visited July 13, 2009). The article notes that Comcast began offering wireless Internet access to customers in the Portland area on June 30, 2009, piggybacking on Clearwire's WiMAX network. Comcast invested \$1 billion in Clearwire, helping fund plans for a national WiMAX rollout. Portland is the first city to get Comcast's new wireless service, but the company plans to add WiMAX service in Atlanta, Chicago and Philadelphia by the end of the year.

[15] CNN Money, http://money.cnn.com/quote/quote.html?symb=CMCSA&mode=pressrelease, (last visited July 13, 2009).

[16] http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html, (last visited July 13, 2009).

[17] See, Jeff Demos, *Online is in Line to Sign You up*, Standard-Examiner, July 10, 2009, available at http://www.standard.net/live/news/178084/ (last visited July 13, 2009).

[18] Comcast Corporation Form 10-K for fiscal year ended December 31, 2008, p. 21.

2009, Comcast gained nearly 329,000 new Internet subscribers and grew its quarterly profit six percent to $772 million.[19] Revenue for the quarter was up five percent to $8.84 billion.[20]

Not only are these attachers' subscriber numbers growing, the rates that these attachers charge subscribers for their services are higher now than ever. While the average monthly bill for cable's expanded basic programming package in 1998 was approximately $26.13, Comcast's average revenue per customer today is $110 per month (more than four times as high) and growing.[21] The "triple play" of video, broadband and voice generates average monthly revenues for Comcast of $120-$130 per customer (over five times as high).[22] These figures continue to increase.[23]

Comcast revenue has increased from $25 billion in 2006 to $30.9 billion in 2007 and then to $34.3 billion in 2008, while net income (profits) has held steady at the astounding level of approximately $2.5 billion for each of the last 3 years.[24]

Meanwhile, Comcast pays attachment rates of just a few dollars per pole *per year*. At this late date in the evolution of the cable industry, artificially low pole attachment rates for Comcast and other cable operators are an unjustified, government-mandated gift, at the expense of the electric utility industry and its ratepayers, not to mention the CLECs with which they compete.

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[19] See, Jeff Demos, *Online is in Line to Sign You up*, Standard-Examiner, July 10, 2009, available at http://www.standard.net/live/news/178084/ (last visited July 13, 2009).

[20] *Id.*

[21] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 26. The average monthly total revenue per video customer increased from $102 in 2007 and $95 in 2006.

[22] Comcast Corporation Form 10-K for fiscal year ending December 31, 2006 at 19.

[23] See, Comcast Reports First Quarter 2009 Results available at http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1282445&highlight= (last visited July 13, 2009), (reporting 5% growth in consolidated revenue and 16% growth in operating income).

[24] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 21.

To the extent some kind of government mandated subsidies were appropriate to jump-start the cable industry in the early days of pole attachments, those days are long gone. Yet Comcast and other media giants continue to get access to the most basic and essential component of "their" pole distribution systems for an artificially low fee that ill-serves the nation's electric utilities and their consumers.

D. There Is No Reason To Believe That Low Pole Attachment Rates Will Stimulate the Provision of VoIP or Other Broadband Service To Rural America

Unlike the profit-generating incentives in place with communications companies, traditional electric utility cost of service proceedings require utilities to include all revenues from pole attachments as an offset to their revenue requirements. In that way, revenues collected from pole attachments are passed through to electric utility ratepayers in the form of reduced overall rates. For this reason, electric utilities do not have the same profit-making motive with respect to pole attachments as do cable and telecommunications companies.

In contrast, no one really knows what cable operators do with their pole attachment subsidy dollars. In the urban, suburban and other areas where they currently provide service, cable operators receive tens of millions of dollars in subsidies per year from electric utility ratepayers. With average revenues of $110/month ($1,320/year) per subscriber,[25] granting cable operators access to fully constructed pole distribution corridors at the miniscule rate of a few dollars per pole per year saves them a lot of money.

One of the huge problems with the existing cable-only pole attachment subsidy is that there is simply no reason to believe that cable operators will take the tens of millions that they save on pole attachments in urban and suburban systems, where customers and revenues are

[25] Comcast Corporation Form 10-K for fiscal year ending December 31, 2008 at 26.

abundant, and invest that money in rural areas where customers and potential revenues are scarce, and there is little chance that they will receive an adequate return on their investments.[26] That, of course, is the reason why these areas have no VoIP telephone or wireline broadband service today.

As explained by the *Coalition* in the Pole Attachment Proceeding, the primary reason the cable industry does not deploy high speed broadband or VoIP service in rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.[27] This was evidenced by the Declaration of a rural cable operator who testified last year in the pole attachment rulemaking proceeding before the Arkansas Public Service Commission.[28]

Cox Communications' Executive Vice President and Chief Strategy and Product Officer confirmed recently that pole attachment rates have little (if anything) to do with the cable industry's failure to deploy VoIP or high speed broadband services in rural areas. At the Commission's August 12, 2009 National Broadband Plan Workshop on Wired Deployment, Cox's Dallas Clement explained that rural areas do not have high speed broadband service first because of the large capital expenditures, second because average revenues may not be

[26] The same argument applies if the Commission were to require building owners to subsidize the rent that cable companies pay for office space. While this savings may help cable operator bottom lines, there is no reason to believe they will invest those savings to provide broadband service to sparsely-populated rural America.

[27] *See*, June 5, 2008, *Ex Parte* Communication filed by the *Coalition* in the Pole Attachment Proceeding. This letter described a Declaration of Dennis R. Krumblis of Buford Media Group LLC ("Buford"), submitted by the Arkansas Cable Telecommunications Association last year in an ongoing proceeding before the Arkansas Public Service Commission, that makes clear that the primary reason the cable industry does not deploy high speed broadband service in rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.

[28] *Id.*

sufficient, and only third because of higher operating expenses.[29] And when he identified the higher operating costs associated with rural broadband deployment, Mr. Clement did not even mention pole attachment costs.[30]

E. Rural Broadband Investment Will Occur Only With Targeted Subsidies To Cover Up-Front Capital Costs

Since the costs associated with system construction, head-end equipment and system upgrades are the primary impediment to VoIP and broadband development in rural areas, the best solution to promoting that development in unserved rural areas is to target subsidies to cover the capital costs associated with that construction.

NCTA itself recognizes the need for targeted subsidies. Rather than continue subsidizing areas where broadband service already exists, NCTA calls for targeted subsidies to unserved areas:

> But targeting subsidies and financial incentives to geographic areas where the marketplace is not currently working – areas that remain *unserved* by any broadband facilities – would be a sensible and effective way to increase deployment and availability of broadband in this country. It would use government resources to achieve an important policy objective without wasting substantial sums of money and without undermining the benefits of marketplace competition. NCTA has encouraged NTIA and RUS to distribute funding to unserved areas and, as discussed below, the Commission should consider how it can adapt the USF program in this way as well.[31]

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[29] *See* transcript of the FCC's National Broadband Plan Workshop, Deployment – Wired, August 12, 2009, at 80 ("[I]n order of priority, I'd say it's the CAPEX to get there. Then it's what's the average revenue out of that home? And that's sort of the second issue. And then the third issue is the cost to support.")

[30] *See id.*, at 76-82.

[31] NCTA Broadband NOI Comments at 27 (emphasis in original).

NCTA's request, therefore, is that subsidies be eliminated to level the playing field in the 92 percent of the country where broadband already exists,[32] and that subsidies be targeted to the eight percent of the country where it does not.

NCTA advocates Universal Service Fund reform to "enable the commission to direct funding to those areas where no provider otherwise would invest in broadband facilities."[33] NCTA notes that "[w]hile market forces brought multiple broadband networks to most areas of the country, some areas are so remote or sparsely populated that no provider has been willing to make the necessary investment."[34]

This type of targeted funding is also consistent with the "Connecting America Act of 2009" legislation that Senator Hutchinson recently introduced in Congress, which would create limited duration tax credits for companies that invest in broadband infrastructure and creating a bond program so that communities can raise funds for their own broadband investments.[35]

NCTA and Senator Hutchinson are absolutely correct that providing targeted subsidies for rural system capital costs will spur the deployment of VoIP and broadband in rural areas.

Continuing colossal pole attachment subsidies to gigantic cable television companies in the urban and suburban areas that they already serve, however, makes no sense at all. Not only does VoIP and broadband already exist in those areas, it is also unlikely to increase VoIP and broadband investment in unserved rural areas. And subsidizing one industry (cable) more than another (CLECs) with artificially low attachment rates distorts the market for existing and future

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[32] NCTA Broadband NOI Comments at ii. ("the cable industry alone now makes high-speed Internet service available to over 92 percent of American households").

[33] NCTA Broadband NOI Comments at 29.

[34] NCTA Broadband NOI Comments at 32.

[35] Connecting America Act of 2009, S. 1447, 111th Cong. (2009).

telephone and broadband services and reduces the competition that NCTA itself understands is necessary to spur the development of those services.[36]

F. The Commission Has No Authority To Reduce The Telecommunications Attachment Rate For CLEC Attachers or Cable Companies Providing Telecommunications Services

If the Commission establishes a broadband pole attachment rate, CLECs (and cable operators, reluctantly) would like the Commission to reduce the pole attachment rate for Section 224 broadband attachments to the artificially low, grossly subsidized Cable-only rate. Time Warner Cable claims that "there is a broad consensus (which includes many pole owners) that the Commission possesses the statutory authority to apply the cable rate to CLECs in this circumstance."[37]

Contrary to Time Warner Cable's claim, the vast majority of electric utility pole owners in fact agree with the *Coalition* that the Commission is statutorily required to establish the attachment rate for commingled telecom/broadband Internet service at or higher than the Section 224(e) Telecommunications rate.[38] Even if extending cable's unproductive and unfair subsidy to CLECs made any sense from a policy perspective (which it does not), Time Warner Cable is

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[36] *See* NCTA Broadband NOI Comments at 26.

[37] Time Warner Cable Comments in the Broadband NOI Proceeding at 25 (June 8, 2009).

[38] See, Comments of the Edison Electric Institute and Utilities Telecom Council at 97 ("[T]he Commission has jurisdiction to increase the rate paid by cable systems to at least the same rate as the telecom rate. In any event, a single rate cannot be lower than the telecom rate."); Comments of the Utilities Telecom Council at 15 ("[B]roadband attachments by telecommunications carriers and cable telephony providers must also be subject to the telecommunications rate by virtue of the underlying use of the attachment for telecommunications services. Anything less than the telecommunications rate would frustrate Congress's intent in Section 224(e)."); Reply Comments of Florida Power & Light, Tampa Electric and Progress Energy Florida, at 20 ("Section 224(e) obligates telecom carriers to pay the telecom rate regardless of what other services they may be providing through their attachments. Charging anything less than the telecom rate for CATV broadband attachments would continue to put CLEC broadband providers at a competitive disadvantage."); Reply Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, at 2 ("If the Commission wants to unify the rate for CLEC and CATV broadband attachments, there is only one way to do it – at the telecom rate. Section 224(e) requires this result."); Reply Comments of American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., PPL Electric Utilities Corporation, Progress Energy, Southern Company, and Xcel Energy Services, Inc., at 3 (strongly endorsing Edison Electric Company and Utilities Telecom Counsel Reply Comments).

wrong as a matter of law in arguing that the Commission possesses the necessary statutory authority to do so.

The Section 224(e)(1) Telecom attachment rate specifies the rate to be charged by "telecommunications carriers to provide telecommunications services."[39] This plain statutory language makes it clear that if a CLEC provides telecommunications service, it must at least be assessed the Telecom attachment rate.[40]

The Section 224(d) Cable-only attachment rate is altogether different, because it applies to "a cable system solely to provide cable service."[41] The Commission therefore is not required to assess the Section 224(d) Cable-only rate if a cable operator provides VoIP or broadband in addition to cable service.

The Supreme Court agrees with this analysis. In *Gulf Power II*, the Court reviewed and affirmed the FCC's decision to apply the Section 224(d) Cable-only rate for a cable system providing cable service comingled with Internet service but specifically recognized that the FCC could have chosen a different (and higher) rate had it wanted to.[42] Both the Commission and the Court, however, recognized no such flexibility with respect to the Section 224(e) Telecommunications rate.

In its Order, the Commission recognized that the Section 224(e) Telecom rate is a mandatory rate, noting that "a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by

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[39] 47 U.S.C. § 224(e)(1).

[40] *Coalition* Comments in the Pole Attachment Proceeding at 7-12 (March 7, 2008). As explained by the *Coalition* in the Pole Attachment Proceeding, this telecom rate itself represents an enormous subsidy for CLEC attachers, but it is considerably better than the colossal subsidy provided by the cable-only rate.

[41] 47 U.S.C. § 224(d) (emphasis added).

[42] *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("*Gulf Power II*").

Section 224(e) by virtue of providing Internet service."[43] The Commission left no doubt that a cable operator providing telecommunications service must pay the higher, mandated Section 224(e) Telecommunications rate:

> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.[44]

On review, the Supreme Court found "sensible" the FCC's analysis that if Internet service were telecommunications, the mandatory Section 224(e) Telecommunications rate would apply to a cable operator providing Internet service.[45]

The Court not only affirmed the Commission's analysis, the Court on its own concluded that the Section 224(e) rate is a mandatory rate that must apply to telecommunications carriers providing telecommunications services: "If the FCC should reverse its decision that Internet services are not telecommunications, only its choice of rate, and not its assertion of jurisdiction,

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[43] *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, at ¶33 (1998) (emphasis added).

[44] *Id.* at ¶34 (emphasis added). The Commission even requires cable operators to notify utility pole owners when they start providing telecommunications service:

> We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering" telecommunications services. We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this Order will reflect this required notification.

Id. at ¶35 (footnotes omitted).

[45] *Gulf Power II*, 534 U.S. at 337.

would be implicated by the reversal."[46] The Court therefore recognized that if telecom services were being provided the attachment rate would change from the Cable-only rate to the Telecom rate because Section 224(e) requires a telecommunications carrier providing telecommunications service to be charged the Section 224(e) Telecommunications rate.

The FCC and Supreme Court agree that if a cable operator or CLEC provides telecommunications service, that entity must pay the Telecommunications attachment rate. Therefore, a uniform attachment rate applicable both to CLECs providing circuit-switched telephone service and to cable operators providing VoIP must be set at least at the statutorily required Telecommunications rate.

As explained by the *Coalition* in the Broadband NOI Proceeding and Pole Attachment Proceeding, while the Telecom rate is the minimum rate that can be charged to a cable operator or CLEC providing telecommunications, there is nothing in the Commission's or Court's analysis that prevents the Commission from approving a rate higher than the Telecom rate when such an entity provides broadband service in addition to telecommunications service. When more than telecom services are provided, more than the Telecom rate should be charged. The Commission lawfully and as a matter of public policy can prescribe a higher rate for both cable operators and CLECs providing more than telecom services that is in line with the rate endorsed by the City of Seattle and the Washington State courts and proposed by the *Coalition* in the Pole Attachment Proceeding. A higher than Telecom rate for more than telecom services would provide a much fairer allocation of costs and eliminate the subsidy altogether for cable operators and CLECs alike.[47]

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[46] *Gulf Power II*, 534 U.S. at 338.

[47] *See*, Reply Comments of the Coalition of Concerned Utilities in the Broadband NOI Proceeding, at 13-14 (filed July 21, 2009). *See also, Coalition* Comments in the Pole Attachment Proceeding at 26-28, 39-41. As stated in those Comments:

III. CONCLUSION

There is no policy or legal reason to justify favoring cable operator VoIP services over circuit-switched telephone services offered by CLECs. The pole attachment rate discrimination in favor of the cable industry should be eliminated to level the playing field and to remove the unproductive and anticompetitive cable rate subsidy that has no place in today's competitive environment.

> A rate for commingled telecommunications and broadband service that is higher than the rate for telecommunications service alone makes sense as a "surcharge' on the basic rate paid by a telecommunications carrier providing telecommunications service. The telecommunications carrier providing telecommunications service is still being charged the telecommunications rate, but the surcharge applies to its added provision of broadband services.

Id. at 39.

WHEREFORE, THE PREMISES CONSIDERED, the *Coalition of Concerned Utilities* urges the Commission to grant the Petition and to act in a manner consistent with the views expressed herein.

Respectfully submitted,

COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
Kansas City Power and Light
National Grid
NSTAR
PPL

By: ____________________
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